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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

NICHOLAS P. PACELLA,
PETITIONER,

v.

MILFORD RADIO CORPORATION D/B/A
RADIO STATION WMRC AND JOSEPH HYDER,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT
OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Petition.

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40 pp

Questions Presented for Review.

I. Whether there is sufficient evidence in the record of the state trial court to support a jury verdict awarded to a petitioner against a radio station and "talk show host" who published an anonymous telephone allegation of criminal behavior against the petitioner who was then a candidate for elective public office in Massachusetts?

II. What is the proper standard for state appellate court review of evidence in a defamation claim made against a radio station and program host on a public radio broadcast devoted to an election in which the petitioner was a candidate for municipal public office?

III. Where the defendant radio station broadcasted an anonymous telephone call accusing the petitioner who was a candidate for public office, of a crime, and where the respondent radio talk show host had been told seven weeks earlier that a rumor of petitioner's involvement in the crime was false, and where the respondent host had sufficient time to make a judgment whether the call should be broadcast, did the trial judge err in granting respondent's motion for judgment n.o.v., after the jury had awarded the petitioner fifteen thousand ($15,000.00) dollars in damages?

Parties to the Proceeding.

The parties are as listed in the caption of the case in this Court.

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Petition.

Opinions Below.

The order of the Massachusetts Supreme Judicial Court is published at 394 Mass. 1051 (1985). There was no written decision issued by the Supreme Judicial Court. The decision of the Massachusetts Appeals Court is published at 18 Mass. App. Ct. 6 (1984), and is reproduced as an Appendix, at the end of this brief.

Jurisdictional Statement.

The order of the court below was made and entered on April 11, 1985. The court below allowed, on May 7, 1985, the petitioner's motion to stay rescript to and including July 10, 1985. This Court is believed to have jurisdiction pursuant to 28 U.S.C. § 1257(3).

Constitutional Provisions Involved.

THE FIRST AMENDMENT.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

THE FOURTEENTH AMENDMENT.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Statement of the Case.

A. *Prior Proceedings.*

Petitioner brought this action of tort for libel in the Massachusetts Trial Court (the Superior Court) on February 22, 1977. The case was remanded to the Milford District Court under M.G.L. c. 231, § 102C, and after trial in that court, there was a finding for the respondents. Petitioner then retransferred the case to the Superior Court for a jury trial. After a trial in the Superior Court between February 1, 1982 and February 5, 1982, the jury awarded the petitioner fifteen thousand ($15,000.00) dollars.

Respondents moved for a directed verdict at the close of the petitioner's case and at the close of all the evidence. The trial judge, Rutledge, J., denied both motions. Then, on February 12, 1982, respondents filed a motion for judgment notwithstanding the verdict, on the ground that petitioner had not met his burden of producing clear and convincing evidence of actual malice. The judge allowed this motion on March 25, 1982, and judgment for the respondents was entered.

The petitioners appealed to the Massachusetts Appeals Court, which affirmed the judgment of the trial court on April 17, 1984. The Massachusetts Appeals Court, relying upon decisions of this Court,[1] concluded that there was no evidence that the broadcaster had "actual knowledge" that the accusation was false, and that there was no showing by "clear and convincing proof" that the talk show host had permitted the statement to be broadcast "with reckless disregard of whether it was false or not," a standard which, according to the Appeals Court, required, in this context, ". . . at least that Hyder [the host] be aware of the 'probable falsity' of the caller's remarks." 18 Mass. App. Ct. at 16.

[1] 18 Mass. App. Ct. 6, 7, 10-16.

The petitioner then sought, and was granted, further appellate review in the Massachusetts Supreme Judicial Court. That court, by an equally divided court, affirmed the judgment of the trial court, and issued no written opinion. 394 Mass. 1051 (1985).

B. *Facts.*

Petitioner Nicholas Pacella was a candidate for the position of Selectman in the Town of Milford (Massachusetts) on May 6, 1975.[2] He was then a teacher and was involved in several Milford community activities.[3] He was a town meeting member.[4] He had previously been a candidate for various town offices.

The respondent Milford Radio Corporation operated Radio Station WMRC, a local Milford radio station, which offered a daily "talk show" called "Counterpoint." Respondent Hyder, an *experienced* broadcaster, was an employee of WMRC and host of the Counterpoint show.[5] The show featured conversations between Mr. Hyder and an in-station guest on topics of interest to the audience. The audience were invited to telephone in to the station with questions or comments to be broadcast.

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[2] The Board of Selectmen in Massachusetts consists of three or four selectmen for a term of not more than three years, with composition and method of election being determined by Massachusetts statute. Massachusetts General Laws, c. 41, §§ 1 *et seq*. The duties of selectmen in Massachusetts may vary, from town to town, and, to some extent, the extent of responsibility is a matter of local perogative. *See*, M.G.L. c. 41, §§ 21, 101, 106A.

[3] Hyder knew, prior to the broadcast of the libel, that Mr. Pacella was also a family man, and a person active in the community.

[4] As such, Mr. Pacella was an elected official, because Massachusetts law and practice recognize both open and limited forms of the town meeting, the latter generally called "representative town meetings." *See*, M.G.L. c. 43A, §§ 2 *et seq*.

[5] The asserted liability of the corporate defendant is based on the actions of its employee, the respondent Hyder.

The asserted libel in this case was broadcast on May 6, 1975, the day before the municipal election for Selectmen, during the Counterpoint show, between the hours of 11 A.M. and 12 noon. On that day the five candidates for Selectmen in Milford had been invited to appear on the show to discuss their candidacies. Petitioner Pacella was unable to be there in person because he was working, but he had tape-recorded a message to be broadcast for him.

At some point during the broadcast, an *anonymous*[6] caller telephoned the station with a "question for Mr. Pacella."

> ". . . He is represented by the Concerned Citizens, and their motto is 'The people have a right to know,' which I agree with. Especially when the integrity of a candidate is in doubt. My question is: Did you, Mr. Pacella, during the construction of your home, ever take without authority certain building materials from the construction site? And were you brought in for questioning by the Milford Police and let go because the owner wouldn't press charges? That is my question."

18 Mass. App. Ct. at 8.

Mr. Hyder responded by suggesting that the caller talk directly to Mr. Pacella that night at home, and then Mr. Hyder went on to the next topic. Several minutes later Mr. Pacella's wife and one of his political supporters called the station to state that the previous call about Mr. Pacella was false. Mr. Pacella was not elected Selectman the next day.

When this anonymous call came into the station, Mr. Hyder was using a tape-delay mechanism by which he heard each

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[6] Both the corporate and individual repondents knew, and solicited, the calls to be anonymous.

incoming call seven seconds before it was broadcast. He had seven seconds to decide whether to broadcast a call or to push the so-called "abort button" and not broadcast it.[7] Mr. Hyder testified at trial that, in this instance concerning the anonymous call about Mr. Pacella, he had enough time to go through a mental process and to make the judgment to broadcast the call.

The jury heard testimony from Mrs. Seena Heller, a political associate and friend of Mr. Pacella. She testified about a telephone conversation she had with Mr. Hyder on March 13, 1975, approximately seven weeks before the May 6 broadcast. Mr. Hyder had called Mrs. Heller on an unrelated matter, and they began discussing the upcoming election. Mr. Hyder asked her opinion about several other candidates and then brought up Mr. Pacella. Hyder asked her why she was supporting Mr. Pacella because Hyder had "heard that the guy is a crook."[8]

When Hyder amplified his comment by explaining that he had been told Mr. Pacella had stolen lumber from a construction site, Mrs. Heller told him quite clearly that the "rumor" was a lie. She cautioned him not to repeat the rumor because he would be adding to it. She then suggested that he talk directly with Mr. Pacella about it. This telephone conversation lasted between 15 and 20 minutes, and during this time Mrs. Heller's son Warren was in the room. Warren Heller, an attorney, testified and corroborated his mother's "version" of the conversation with Hyder.

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[7] There was no evidence before the jury to indicate that the radio station utilized any personnel to screen telephone calls to determine the identity of callers or reliability of information. There was no evidence offered by either respondent of any safeguard whatsoever, beyond the seven second "abort button," to deflect defamatory statements from anonymous callers prior to public broadcast.

[8] In his testimony Mr. Hyder vigorously denied having called petitioner a crook. He also denied discussing with Mrs. Heller the "rumor" about Mr. Pacella and the building materials.

Mrs. Heller, at the time of her conversation with Hyder, was Chairman of the Planning Board for the Town of Milford.[9]

Mr. Hyder testified that he did not know Mr. Pacella personally, although he had met him one year before the May 6, 1975 broadcast in connection with the Counterpoint Show's 1974 Milford candidates' show. He knew that Mr. Pacella was a teacher and a family man.

Mr. Hyder testified that some years before the May 6 broadcast, he had heard a rumor about Mr. Pacella's stealing lumber. He claimed that he did not remember who had told him the rumor, but he guessed it was someone at a social occasion. He claimed no personal knowledge whether the rumor was true. In answer to a question how long he thought about the rumor, he answered that he "dismissed" the rumor. He also stated that he did not attach any credence to the rumor when he first heard it because he had no personal knowledge about the incident.

Mr. Hyder denied having called Mr. Pacella a "crook," and denied that he and Mrs. Heller had discussed the rumor about Mr. Pacella and the building materials.

Mr. Hyder testified extensively about his views on the public's right to know everything, even rumors, about a candidate for public office. In this testimony he made several different statements about broadcasting rumors and falsehoods. He told the jury that his current position was to broadcast a rumor unless, by his own personal knowledge, he knew it was false. He testified that he would have broadcast a remark he knew to be false if Mr. Pacella had been there to answer it.[10]

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[9] The Planning Board is a municipal office established by statute. In the Town of Milford, members are either elected at the annual town meeting or appointed in such manner as the annual town meeting may determine. M.G.L. c. 41, § 81A.

[10] His current testimony was compared with his testimony at a deposition taken four and one half years previously and with his testimony at the District Court trial.

He testified about the judgment call he made when he heard the anonymous call on May 6, 1975. He stated that the seven seconds he had were adequate time for him to exercise his judgment about the call, and that he intentionally broadcast the call because the public has the right to know about the character of a candidate. He denied having stated that he let the call on "for effect," as petitioner had earlier testified. Finally, he testified that, on May 6, 1975, he was "jarred" by the anonymous call about Mr. Pacella.

There was considerable testimony about the alleged incident in 1962 which gave rise to the rumor, but all of that evidence showed that there was no truth to the rumor.[11]

The Massachusetts Appeals Court stated:

> While the caller's statement was in interrogatory form, we do not lay particular stress on that fact and, at least for purposes of this opinion, assume that the remarks imputed a crime to Pacella and hence were defamatory per se. *Lynch* v. *Lyons*, 303 Mass. 116, 118-119 (1939). *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). Those remarks *were found by the jury to be false*, and the respondents do not contend otherwise.

18 Mass. App. Ct. at 11 (emphasis added, footnote omitted).

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[11] Briefly, the allegation was that, on a Sunday morning in the spring, Milford Police Chief McGrath observed Mr. Pacella take two or three bricks belonging to one Peter Farese from a construction site on Grant Street across from McGrath's house. Mr. Pacella denied this allegation. The rest of the testimony showed that there was no police record of a complaint or questioning on this alleged incident. Thus there was no evidence that Mr. Pacella ever took building materials without authority.

The defendants originally raised the defense of truth, and accordingly plaintiff offered evidence to rebut that defense. However, defendants did not raise the issue of truth in thier motions for directed verdict and for judgment n.o.v. Accordingly, plaintiff does not state in detail the facts elicited on the issue of truth.

Argument.

I. THE LOWER COURTS IN MASSACHUSETTS HAVE REJECTED THE LAW OF THIS COURT IN SUSTAINING THE JUDGMENT N.O.V. BECAUSE THE EVIDENCE, ON THE ISSUE OF ACTUAL MALICE, IS CONSTITUTIONALLY SUFFICIENT TO SUSTAIN THE JURY'S VERDICT AND A RADIO "TALK SHOW" HOST IN A RADIO BROADCAST STATION IS NOT IMMUNE FROM CIVIL LIABILITY IN THE BROADCAST OF AN ANONYMOUS AND FALSE ALLEGATION OF CRIMINAL BEHAVIOR, ATTRIBUTED TO A PUBLIC FIGURE, WHEN THE ONLY PRECAUTION BETWEEN CALLER AND ACTUAL RADIO BROADCAST IS A SEVEN-SECOND "ABORT" BUTTON.

The constitutional standard directed by this Court in public-figure defamation cases is well settled: a plaintiff public figure may recover damages against the publisher of a defamatory statement only on clear and convincing proof of "actual malice." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). "Actual malice" has been defined as requiring that the plaintiff establish by "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz*, 418 U.S. at 342.

In the instant case, it is undisputed that the petitioner is a public figure. It is also undisputed that the statement about him which the respondent published, a false accusation of crime, was defamatory. The petitioner's responsibility, then, under the standards promulgated by this Court, is clear and convincing evidence of "actual malice." The petitioner asserts that the review of his case by this Court, and the appellate courts in Massachusetts below, is, and was, to determine whether the evidence, in the light most favorable to him, and with all reasonable inferences drawn in his favor, was suffi-

cient to bring minds of ordinary intelligence and sagacity to the persuasion that the respondents either knew the statement they published was false, or had substantial doubts as to its truth.

This Court has consistently refused to apply objective standards to determining actual malice. No matter how unreasonable (in the Common Law tort sense) the defamatory statement, the respondent is constitutionally protected unless he ". . . in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). At issue, then, is the *state of mind* of the respondent.

Proof of mental state has been recognized as a prerequisite to a liability for which credibility and demeanor of witnesses is extremely critical. And, this Court has noted that it would be rare, indeed, for the defamation respondent to admit to having had serious unresolved doubts. *Herbert* v. *Lando*, 441 U.S. 153 (1979). *See also, Morrison* v. *Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979).

This Court has exclusively recognized the critical role credibility frequently plays in assessing mental state, and has scrutinized the practice of summary disposition of defamation cases. This Court has acknowledged that ". . . proof of 'actual malice' . . . does not readily lend itself to summary disposition," and expressed "some doubts" that summary judgment should be considered the "rule" rather than the "exception" in defamation cases. *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). And, this Court more recently cited *Hutchinson* for the proposition that "no special rules apply for summary judgment" in defamation cases:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. . . . We have already

> declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

Calder v. *Jones*, 52 U.S.L.W. 4349, 4351 (March 20, 1984).

This Court has also held that jury verdicts in defamation cases require careful scrutiny, and that verdicts in these cases are entitled to less deference than in other cases. This Court in *New York Times* directed that in such cases courts "must 'make an independent examination of the whole record' . . . so as to assure that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285. The rule has been followed explicitly by this Court. *St. Amant* v. *Thompson, supra; Greenbelt Cooperative Pub. Assoc.* v. *Bresler*, 398 U.S. 6 (1970).

This Court restated the defamation review rule in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 52 U.S.L.W. 4513 (April 30, 1984).

This Court held:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment Protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice.

Id. at 4520.[12]

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[12] The decision of the Massachusetts Appeals Court contains an explicit statement as to the standard of review believed by it to be applicable to Pacella's

The petitioner asserts that the objective evidence in the record of his case constitutionally permitted the Massachusetts jury to infer that the respondents had substantial doubts and the reckless state of mind which such doubts make out. The petitioner is mindful that this Court has cautioned that there is no "one infallible definition" of reckless disregard; "its outerlimits will be worked out through case-by-case adjudication. . . ." *St. Amant* v. *Thompson*, 390 U.S. at 730.

The source of the false statement in this case was an anonymous telephone call to the radio station. An anonymous telephone call is strong evidence of actual malice, as this Court has explained:

> Professions of good faith [by a defendant publisher] will be unlikely to prove persuasive, for example, where a story is . . . based wholly on an unverified anonymous telephone call.

St. Amant v. *Thompson*, 390 U.S. at 732. Here the statement published by respondents was wholly from an anonymous telephone call. And this phone call was unverified.

The significance of the anonymity of the call is emphasized by the resonating factors which further surround it and define the character of the respondents' behavior in the operation of the radio station. It is uncontested, or readily inferrable, that:

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case: "We think of none of these factors, whether taken separately or in *unison*, shows the requisite 'reckless disregard' to impose liability on Hyder for failing to censor the statement." 18 Mass. App. Ct. at 10. [Emphasis supplied.]

Because the Supreme Judicial Court (technically, the "court below") issued no opinion, and "by an equally divided court" affirmed the judgment of the trial court, there is no apparent or explicit standard of the highest Massachusetts court in appellate review of Pacella's case.

— Individual respondent Hyder was an *experienced* radio broadcaster;

— The radio audience were *invited* to telephone into the radio station with questions or *comments* which were then to be publicly broadcasted;

— There was no evidence in the case that the corporate respondent, the radio station operator, utilized any personnel to screen telephone calls to determine identity of callers or reliability of information;

— There was no evidence offered by either corporate or individual respondent of any safeguard whatsoever, beyond the seven-second "abort button," to deflect defamatory statements from anonymous callers prior to broadcast;

— The anonymous format was designed by the respondents as part of a commercial radio broadcast, effected, at least in part, for profit;

— There are numerous safeguards that the respondents chose not to employ which would have provided for greater safety from defamatory comments;

— The defamatory publication which took place in the case was, in large measure (generically, at least, if not specifically), a deliberate and calculated result, with risk assumed, by the respondents.

The Massachusetts Appeals Court ignored the responsibility of the broadcasters to provide reasonable safeguards in the context of political talk shows. That court, throughout its opinion, emphasized the circumstance of a "seven-second preview" of the caller's "question" and an opportunity to prevent its broadcast:

> [A] statement called into a talk show cannot be verified within the seven seconds afforded by electronic equipment [citation omitted]. In determining 'reckless disregard,' 'the amount of time necessary and available for checking the accuracy of [a] story' is, of course, relevant [citations omitted].

18 Mass. App. Ct. at 14. However, that court apparently ignored the fact that the respondents themselves designed the format of this particular show, and were, accordingly, responsible for "the medium by which the statement is disseminated and the audience to which it is published." *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 309 (1982), quoting *Information Control Corp.* v. *Genesis I Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

The flavor of the Appeals Court's opinion makes the seven-second abort period a *fait accompli* — an immutable circumstance under which the respondents suffered and were encumbered, rather than a circumstance which they both designed and controlled, at their risk, and for their profit.

Petitioner Pacella asserts that the Massachusetts Appeals Court, accordingly, ignored his right, and the rights of all public figures similarly situated, to a format designed with at least some minimal effort to safeguard the injury that occurrred in this case, without diluting or chilling the interplay between audience and caller.

Further, the rumor which defendant Hyder had heard several years previously is not verification of the anonymous phone call. It lacks all the traditional indicia of reliability. Hyder testified that he did not remember who told him the rumor; he testified that he "dismissed" it when he heard it and did not attach any credence to it because he had no personal knowledge of the alleged incident. The jury could have inferred from

these facts that Hyder's familiarity with the "rumor" was in no sense a verification of the anonymous phone call. The source of the published statement, then, was totally unreliable. *Cf. St. Amant* v. *Thompson*, 390 U.S. at 733, and *Associated Press* v. *Walker*, 388 U.S. 130, 158-159 (1967). (In both cases cited, the publishers had reasons to believe their source).

In contrast, the indications Hyder had of the statement's falsity were reliable. Mrs. Heller testified that she told Hyder approximately seven weeks before the date of the broadcast that the rumor of petitioner's involvement in a crime was an "out and out lie." Mrs. Heller testified she had a friendly relationship with Hyder, and Hyder apparently thought enough of her opinion to discuss with her other candidates for public office in Milford. She herself was a public officer. The jury could judge her credibility and infer what Hyder thought of her reliability.

Mrs. Heller's position as a friend and political associate of Mr. Pacella may fairly have been a factor in Hyder's, and the jury's, assessment of her. But her acquaintance with Mr. Pacella did not make a nullity of her emphatic statement to Hyder. In *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967), the publisher had been notified by both the plaintiff public figure and his daughter that the story to be published was false, but they published it anyway. This Court found this notice significant:

> It might indeed be argued that this conduct would have sufficed, under proper instructions, to satisfy even the 'actual malice' standard of *New York Times*, the notice to the Saturday Evening Post being considered as furnishing the necessary 'mental element.' (Citations omitted).

388 U.S. at 161 n.23. Mrs. Heller's notice to Hyder that the rumor about Mr. Pacella was false, similarly, is further clear and convincing evidence of the necessary "mental element."

Another indication to Hyder of the statement's falsity was his own knowledge of the petitioner. Hyder did not have a long personal acquaintance with Mr. Pacella. But Hyder did know that Mr. Pacella was a teacher, a former candidate, an active community worker, and a family man. More importantly, from his protestations that he did not call Mr. Pacella a "crook," the jury could reasonably infer that Hyder did not think Mr. Pacella was a "crook." From all Hyder's statements about Mr. Pacella, the jury could infer that Hyder thought very well of Mr. Pacella. His opinion of Mr. Pacella is further evidence that he had serious doubts about the truth of the anonymous caller's accusation.

The small amount of time the defendant had for deliberating whether or not to broadcast the statement has been held by the Massachusetts Supreme Judicial Court as weighing in favor of a libel defendant. *See, National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220 (1979). But the short time for deliberation in this case cuts the other way. Hyder testified that the seven seconds he had was adequate time for him to think and to make a judgment whether to broadcast the anonymous call. While seven seconds was not enough time for him to verify the statement, it is clear from his testimony that in his judgment verification was necessary. This deliberate "judgment call" is evidence from which the jury could infer the necessary mental element.

Finally, this case has other evidence of recklessness which must be considered. This other evidence concerns the respondent's attitude about what he was doing. There was testimony that he broadcast the statement about Mr. Pacella "for effect." This is like the evidence in *Curtis Publishing* v. *Butts, supra,* that the defendant magazine had instituted a policy of sophisticated muckraking designed to make people angry. 388 U.S. at 158, 169 (Opinions of Harlan, J. and Warren, C.J., concurring).

Hyder also testified that he would broadcast a statement regardless of its truth if it concerned a public officer or candidate, particularly if the person were there to refute a false statement. The testimony on this point was confusing because Hyder testified differently at the Superior Court trial, the District Court trial, and at a deposition. But the jury could have inferred from all Hyder's testimony that on May 6, 1975, at least, the falsity of a statement about a public figure like Mr. Pacella would not deter him from publishing the statement.

In summary, then, the petitioner asserts that this evidence is clear and convincing evidence from which the jury could have inferred that respondent Hyder broadcast the falsehood about Mr. Pacella even though he had serious doubts about its truth. The petitioner recognizes that First Amendment concerns are of greatest importance in a case involving questions about the integrity of a candidate for public office. *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295 (1971).[13] But these interests must be balanced.

The *New York Times* test of actual malice is the method of balancing these interests. It may be the rare public candidate libel case which meets the standards of the actual malice test. But surely where the respondent broadcasts an anonymous phone call, repeating a "rumor" which he did not credit when he first heard it, about a man he denies having called a crook, and where a credible person has told him the rumor is a lie, the inference that he had substantial doubts which he recklessly disregarded, is more probable than "as likely as not." It is

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[13] Since petitioner was only a candidate and not an elected official, however, the defamatory statement here cannot be analogized to seditious libel, which is the most protected free speech. *Curtis Publishing* v. *Butts,* 388 U.S. at 153-155. The actual malice requirement is the same whether a plaintiff is a public official or a public figure, but the policy reasons for requiring proof of actual malice are different. *Id.*

clear and convincing. This case meets the strict standards of *New York Times* v. *Sullivan, supra,* and the trial judge erred in upsetting the jury verdict.

Conclusion.

This Court has defined, in an effort beginning with *New York Times,* the parameters of First Amendment protection to be accorded publishers of allegedly defamatory information about public figures. The Massachusetts Courts implicitly established a standard for radio talk shows. Although it does not appear in the record, clearly, judicial notice permits the assertion that such shows in Massachusetts touch millions of lives everyday and utilize countless thousands of hours of broadcast time during the course of a year.

The Massachusetts courts, misapplying the decisions of the United States Supreme Court, have deprived the petitioner of the benefits of jury trial and verdict while, at the same time, failing to discuss or prescribe any safeguard to be employed by a radio show published, short of implicit approval of a "seven-second abort button." The Massachusetts Appeals Court rendered its opinion, and stated standards applicable to an entire industry, upon a factual predicate which had been designed, exclusively, by these respondents. The petitioner asserts that he has been deprived of constitutional protection, personally, and that the standard established by the lower court

is vague and insufficient, and to the extent explicit, incorrect as a matter of the law as exposited by this Court.

Respectfully submitted,

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NICHOLAS P. PACELLA *vs.* MILFORD RADIO CORPORATION & another.[1]

Worcester. December 8, 1983. — April 17, 1984.

Present: GRANT DREBEN, & SMITH, JJ.

Libel and Slander. Constitutional Law, Freedom of speech and press, Libel and slander. *Practice, Civil*, Judgment notwithstanding verdict.

In an action by a candidate in a local election, against the operator of a radio station and its employee, the moderator of a radio "talk show," seeking damages for allegedly defamatory statements made by an anonymous telephone caller during a broadcast devoted to the election, the plaintiff did not meet his burden of proving by clear and convincing evidence that the defendants had broadcast the statements with knowledge that they were false or with reckless disregard of whether they were false or not. [ ]

In the context of an election "talk show" conducted by a radio station employee equipped with an electronic delay device which afforded him seven seconds to decide whether to prevent any statement from being broadcast, the employee had no duty to prevent the broadcast of an anonymous telephone caller's allegedly defamatory statements concerning one of the candidates in the election, where it was not shown that the employee was aware of the probable falsity of the statement. [ ]

CIVIL ACTION commenced in the Superior Court on February 22, 1977.

The case was tried before *Rutledge*, J., and a motion for judgment notwithstanding the verdict was heard by him.

David A. Mills for the plaintiff.

William J. LeDoux for the defendants.

DREBEN, J. In 1975 Nicholas P. Pacella was a candidate for the Milford board of selectmen. On the day before the election, an anonymous caller telephoned the corporate defendant's radio station and made certain defamatory remarks

[1] Joseph G. Hyder.

directed against Pacella on a talk show devoted to the election. Although an electronic delay system gave the defendant Joseph G. Hyder, the talk show's host, a seven-second preview of the caller's question and an opportunity to prevent its broadcast, he did not use the abort button. Pacella lost the election and, in this libel action, sued Hyder and the corporate defendant, the former employer of Hyder. A Superior Court jury assessed $15,000 damages against the defendants, but the trial judge allowed the defendants' motion for judgment notwithstanding the verdict. We affirm on the ground that Pacella, a public figure, did not meet his burden of proving by clear and convincing evidence that the defendants published the caller's statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). *National Assn. of Govt. Employees, Inc.* v. *Central Bdcst. Corp.*, 379 Mass. 220, 230-231 (1979), cert. denied 446 U.S. 935 (1980).

We turn to the facts, considered in the light most favorable to the plaintiff.[2] The five candidates for the Milford board of selectmen were invited by radio station WMRC to appear on the station's "Counterpoint" talk show on May 6, 1975, for an hour-long program concerning the election. Hyder explained the proposed format to Pacella — statements by the candidates were to be followed by a question and answer session with the station's call-in audience. Pacella, a school teacher with inflexible hours, decided not to appear in person but to submit a taped statement. He expressed uneasiness about the question

[2] This standard has been applied by the Supreme Judicial Court in summary judgment defamation cases. *National Assn. of Govt. Employees, Inc.*, 379 Mass. at 231. *Lyons* v. *New Mass Media, Inc.*, 390 Mass. 51, 52 (1983). *Aarco, Inc.* v. *Baynes*, 391 Mass. 560, 564 (1984). We see no reason to apply a different rule to a motion for judgment n.o.v. See *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 880 (1975) (Quirico, J., dissenting). The appellate role in these libel cases, however, "requires careful appellate review of the facts," and we must "examine for ourselves" the whole record to see whether the statements in their context are of a character which the First Amendment protects. *Cole* v. *Westinghouse Bdcst. Co.*, 386 Mass. 303, 308, cert. denied 103 S.Ct. 449 (1982), quoting from *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

and answer format but was assured by Hyder that there would be no problems, Hyder stating, "How can they ask you questions if you are not here?"

Nevertheless, at the time of the actual broadcast, Hyder and an anonymous caller to "Counterpoint" had the following interchange during the question period following the candidates' statements:

> CALLER: "I have a question for Mr. Pacella."
>
> HYDER: "Mr. Fernandez is here. Mr. Pacella was on tape recording earlier. He was not present."
>
> CALLER: "So I can't ask a question of him?"
>
> HYDER: "He's not here to answer. How can you possibly do that, dear? [*sic*] If you can tell me how, I'll be happy to relay the question."
>
> CALLER: "Well, could I ask the question and you can relay it to him?"
>
> HYDER: "Well, ah, by the time we get an answer the elections will be over. Rhetorically, if you want to ask it, go ahead."
>
> CALLER: "Pardon?"
>
> HYDER: "Go ahead."
>
> FERNANDEZ: "Maybe I could answer for him."
>
> HYDER: "Yeah. Go ahead, ask the question."
>
> CALLER: "All right. He is represented by the Concerned Citizens, and their motto is, 'The people have a right to know,' which I agree with. Especially when the integrity of a candidate is in doubt. My question is: Did you, Mr. Pacella, during the construction of your home, ever take without authority certain building materials from the construction site? And were you brought in for questioning by the Milford Police and let go because the owner wouldn't press charges? That is my question."

At this point, Hyder decided to terminate the call and stated: "Uh huh? Well I suggest you contact Mr. Pacella tonight

when he comes home from his job, alright?"[3] Later in the program, Pacella's wife and one of his supporters responded, calling the charge vicious, upsetting, and untrue. Hyder concluded his conversation by thanking Mrs. Pacella as set forth in the margin.[4]

Although the defendants at trial introduced evidence as to the truth of the construction site story, referred to as the "Grant Street rumor," the jury found otherwise.[5] There was also evidence that the rumor had persistence and had been heard by several persons. Pacella testified that he had heard the story several times, first in 1962 or 1963, again in 1974 and once again in 1975 prior to the broadcast. He had discussed it with some of his campaign workers and his campaign manager. Although concerned about the rumor, Pacella never alerted Hyder to the possibility that it might surface. Lawrence Shane, the former manager of the station (deceased at the time of trial), indicated, in a deposition read to the jury, that he also had been aware of the rumor.

Hyder testified that he had heard the Grant Street story some five or six years before the broadcast in a "social context" and that at that time he had no personal knowledge whether the rumor was true. Seena Heller,[6] the mother of Pacella's campaign manager and a strong supporter, testified that Hyder, who had called Heller some seven weeks before the broadcast on an unrelated matter, had referred to Pacella as a "crook."[7]

[3] Hyder's last remark was not included in the transcript but is referred to by the plaintiff in his brief and noted by the defendants. The remark also appears on an exhibit attached to the complaint.

[4] "Mrs. Pacella, thank you so much for calling. I'm glad that you were able to clarify it for us, and I think that somebody has taken advantage of the opportunity, the fact that your husband was not here to reply, and I think that you've handled it very nicely."

[5] The incident that gave rise to the rumor took place in 1962. There was conflicting testimony at trial. A policeman, who by the time of trial had become chief of police of Milford, testified that he had observed Pacella removing bricks from a construction site on Grant Street. Pacella claimed he had not taken the bricks, but had taken a board which he had paid for.

[6] Seena Heller was chairman of Milford's planning board and known to Hyder as the wife of his daughter's podiatrist.

[7] Hyder denied the statement.

At that time she informed him that the rumor was unequivocally false, cautioned him against repeating it, and suggested that he discuss the matter with Pacella. Hyder testified that he did not use the abort button on May 6, 1975, and that he intentionally allowed the call to be broadcast because he believed that the public has the right to know about a candidate. He also testified that the seven seconds were sufficient time for him to exercise that judgment.

Pacella claims that he has carried his burden of proving with convincing clarity that Hyder published the statement with "reckless disregard" of its truth and relies on the following evidence: Hyder had dismissed the rumor when he had first heard it; the source of the statement was anonymous and hence unreliable; Seena Heller ardently denied the truth of the statement; Hyder's own knowledge of Pacella made the statement improbable; Hyder acknowledged that he had had enough time to exercise judgment and that he intentionally broadcast the statement because of the public's right to know about the candidate; Hyder, at a time after the broadcast, stated he had published it "for effect." We think of none of these factors, whether taken separately or in unison, shows the requisite "reckless disregard" to impose liability on Hyder for failing to censor the statement.

We start, as we must, with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). There, the Supreme Court announced a rule, designed to insure "that debate on public issues . . . be uninhibited, robust, and wide-open," which "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 270, 279-280. His proof must be "clear and convincing." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). *Callahan* v. *Westinghouse Bdcst. Co.*, 372 Mass. 582, 583 (1977).

Several matters need not concern us. Pacella concedes, as he must, that as a candidate for public office he and the subject matter of the discussion are within the rule. "[P]ublications

concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271 (1971). "Few personal attributes are more germane to fitness for office than dishonesty." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 345. "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy, supra* at 272.

While the caller's statement was in interrogatory form, we do not lay particular stress on that fact and, at least for purposes of this opinion, assume that the remarks imputed a crime to Pacella and hence were defamatory per se.[8] *Lynch* v. *Lyons*, 303 Mass. 116, 118-119 (1939). *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). Those remarks were found by the jury to be false, and the defendants do not contend otherwise.

Our review of the record indicates that there was no evidence that Hyder had actual knowledge that the rumor was false. Thus, the crucial question is whether Hyder acted "with reckless disregard[[9]] of whether it was false or not." Cases sub-

[8] Defendants would have us draw a line between an inquiry about an accusation circulating in the community (as they characterize the call) and an accusation in itself.

[9] "Reckless disregard" has been variously described. In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), it was said that sanctions could be imposed only for statements "made with the high degree of awareness of their probable falsity demanded by [the *New York Times* case]." A case much cited, *St. Amant* v. *Thompson*, 390 U.S. 727, 730-731 (1968), suggests that while "[r]eckless disregard . . . cannot be fully encompassed in one infallible definition," it requires that there "be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." See *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. at 867; *Lyons* v. *New Mass Media, Inc.*, 390 Mass. 51, 57 (1983). In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334-335 n.6 (1974), the Court quoting the passage previously cited from *St. Amant*, explained, "In [*St. Amant*], the Court equated reckless disregard of the truth with subjective awareness of probable falsity." See also *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979) (alleged defamer "must know or have reason to suspect that his publication is false"). In Massachusetts see *National Assn. of Govt. Employees, Inc.* v. *Central Bdcst. Corp.*, 379 Mass. at 232 ("mordant unconcern with the truth of the particular statement").

sequent to the *New York Times* case have made clear that the test is a subjective one,[10] and that the plaintiff must focus on the "conduct and state of mind of the defendant." *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979). The circumstances in which the statement is made are, of course, significant in determining whether recklessness may be found (see *Cole* v. *Westinghouse Bdcst. Co.*, 386 Mass. 303, 309, cert. denied 103 S.Ct. 449 [1982]), an assessment which also involves whether such a finding would intrude in a "forbidden" manner on the "field of free expression." *New York Times Co.* v. *Sullivan*, 376 U.S. at 285. See *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. at 855.

Of particular importance here is "the medium by which the statement is disseminated and the audience to which it is published." *Cole* v. *Westinghouse Bdcst. Co.*, 386 Mass. at 309, quoting from *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). The defendants organized a program concerning an upcoming election, asked the candidates to present statements, and afforded the public the opportunity to question the candidates freely. Neither Hyder nor the station had any power to restrict or censor the material presented by the candidates. This is because the United States Supreme Court, relying on the public interest in "full and unrestricted" political discussion, has held in unmistakable terms[11] that

[10] *St. Amant* v. *Thompson*, 390 U.S. at 732. *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. at 867-869. *National Assn. of Govt. Employees, Inc.* v. *Central Bdcst. Corp.*, 379 Mass. at 232.

[11] "The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, involving as it does, consideration of various legal defenses such as "truth" and the privilege of fair comment. Such issues have always troubled courts. Yet, under petitioner's view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censor-

47 U.S.C. § 315(a)[12] prevents a broadcaster from deleting libelous statements of candidates and that radio stations are immune from liability for broadcasting such statements. *Farmers Educational & Co-op. Union* v. *WDAY, Inc.*, 360 U.S. 525, 530-531 (1959). See also G. L. c. 231, § 91A.

It is readily apparent that caution must be exercised before imposing liability on Hyder for insufficient use of the abort button lest the "robust and wide-open debate" protected by *New York Times* be inhibited in a substantial way. This consideration was emphasized in *Adams* v. *Frontier Bdcst. Co.*, 555 P.2d 556 (Wyo. 1976), where the Supreme Court of Wyoming ruled that the decision of a radio station not to use an electronic delay system in connection with a talk show did not constitute "reckless disregard" under the *New York Times* rule. The station was held not liable for broadcasting a defamatory falsehood made by an anonymous caller. See also *Demman* v. *Star Bdcst. Co.*, 28 Utah 2d 50, 53 (1972), where the Supreme Court of Utah reached the same result. Contra *Snowden* v. *Pearl River Bdcst. Corp.*, 251 So.2d 405, 410 (La. App. 1971).

The court in *Adams* also noted, "The impact of the censorship would not fall upon the broadcaster's words and ideas; instead, it would be applied to the opinions and ideas of those members of the public who elected to participate in this kind of public forum." 555 P.2d at 567. See also *New York Times Co.*, 376 U.S. at 266, where the Supreme Court pointed out the dangers of shutting off "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech even though they are not members of the press."

ship of libelous matter. Because of the time limitation inherent in a political campaign, erroneous decisions by a station could not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent political decision." 360 U.S. at 530-531.

[12] Section 315(a) has subsequently been amended, but those amendments are not here relevant.

Unlike the commercial advertisement in *New York Times* which can be checked for accuracy prior to publication, a statement called into a talk show can not be verified within the seven seconds afforded by electronic equipment. See *National Assn. of Govt. Employees, Inc.*, 379 Mass. at 224 n.4, where the court refers to the Wyoming *Adams* case. In determining "reckless disregard," "the amount of time necessary and available for checking the accuracy of [a] story" is, of course, relevant. *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. at 869. See *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 157, 158-159 (1967) (hot news). See also *Priestley* v. *Hastings & Sons Publishing Co.*, 360 Mass. 118, 123-125 (1971).

Moreover, the role of a talk-show host differs from that of a reporter or newscaster. His function is not to discover the news but to moderate the public debate. "It is one thing to require a newspaper to check the accuracy of an interview. But it may be another matter to hold a TV newsperson responsible for the spontaneous live utterance of an interviewee." *Jones* v. *Taibbi*, 508 F. Supp. 1069, 1074-1075 n.12 (D. Mass.), cert. denied 454 U.S. 1085 (1981). To impose on the talk-show host a duty of private censorship[13] whenever he has an insufficient basis for assessing the truth of a statement would surely result in the extinction of the public talk show.

We now return to Pacella's claims that there is here sufficient evidence to prove with convincing clarity that Hyder published the statement with "reckless disregard" of its truth. Pacella is correct that an anonymous call carries less reliability than one from an identified source. A story "based wholly on an unverified anonymous telephone call" is one of the instances in *St. Amant* v. *Thompson*, 390 U.S. at 732, where the Supreme Court indicated "[p]rofessions of good faith will be unlikely to prove persuasive." However, sole reliance on an anonymous

[13] The term "censorship" connotes "all factors which would inhibit the freedom and spontaneity of the public dialogue." *Adams* v. *Frontier Bdcst. Co.*, 555 P.2d at 565. See *New York Times*, 376 U.S. at 277 (fear of damage awards "may be markedly more inhibiting than the fear of prosecution under a criminal statute").

telephone tip in a context where there is time to check it out is quite different from receiving a call on a talk show where there is no such time. Even if the talk-show host were to require identification, a caller on a talk show (unlike the tipster whose identity could later be verified) could easily adopt an assumed name and the host would be none the wiser. We think the lack of identification, although undesirable, is not enough.

The fact that Seena Heller denied the truth of the statement is likewise not dispositive. In the climate of a campaign all kinds of allegations abound.[14] "[L]iability under the 'clear and convincing proof' standard . . . cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Edwards* v. *National Audubon Soc., Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied sub nom. *Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977). *Colombo* v. *Times-Argus Assn.*, 135 Vt. 454, 458 (1977).

There was no evidence that Hyder knew Pacella personally. Compare *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. at 869. He had met him once, knew that he was a teacher and a family man, and that he had held town offices. Certainly such knowledge did not make the allegation "inherently improbable." *St. Amant*, 390 U.S. at 732.

Hyder's own statement that he had enough time to decide to publish based on his view that the public had the right to know does not, in any way, indicate recklessness, but only intentional publication. See *St. Amant* v. *Thompson*, 390 U.S. at 733. His other alleged statement that he published the call "for effect" does not approach a showing of malice in the con-

[14] See Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875 (1949) ("Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like have usually filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent. If actionable defamation is possible in this field, one might suppose the chief energies of the courts, for some time after every political campaign, would be absorbed by libel and slander suits."). Noel was cited by *New York Times*, 376 U.S. at 273 n.14, and by *Monitor Patriot Co.* v. *Roy*, 401 U.S. at 274 n.4.

stitutional sense. Bad motive or hostility is not what is meant by malice in the *New York Times* sense. *National Assn. of Govt. Employees, Inc.* v. *Central Bdcst. Corp.*, 379 Mass. at 232. *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967) (per curiam).

In sum, we conclude that there has been no showing by "clear and convincing proof," that Hyder permitted the statement to be broadcast "with reckless disregard of whether it was false or not," a standard which, in this context, requires at least that Hyder be aware of the "probable falsity" of the caller's remarks.[15] See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 334-335 n.6. See also cases cited at note 9, *supra*. The trial judge was correct in allowing the defendants' motion.

Judgment affirmed.

[15] To the extent that there may be an ambiguity in some opinions suggesting that "serious doubt" as to the truth of a statement differs from awareness of the "probable falsity" of a statement, we think that in the context of a talk show covering an election, where there is neither time for reasoned judgment nor for verification, the ambiguity should be resolved in favor of permitting the broadcast of an outside call. We repeat that *Gertz* takes the position there is no distinction in these formulations. See note 9, *supra*. See also *Adams* v. *Frontier Bdcst. Co.*, 555 P.2d at 564 n.5.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, April 11, 1985.

IN THE CASE NO. SJC-3583

NICHOLAS P. PACELLA

vs.

MILFORD RADIO CORPORATION & another.

pending in the Superior Court Department of the Trial Court for the County of Worcester No. 83-80

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is affirmed by an equally divided court. Justice Abrams took no part in the decision of this case.

BY THE COURT,

/s/_____, ASS'T CLERK.
Frederick J. Quinlan

April 11, 1985